

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JERMAINE GRANT,

Defendant.

OPINION AND ORDER

11-cv-191-bbc
09-cr-57-bbc

Defendant Jermaine Grant has filed a motion for post conviction relief under 28 U.S.C. § 2255, contending that he was denied the effective assistance of counsel at his trial. Because defendant's allegations of counsel's ineffectiveness contradict statements he made under oath and in open court, he cannot succeed on his motion.

RECORD FACTS

Defendant Jermaine Grant was charged in an indictment with one count of maintaining a drug house, in violation of 21 U.S.C. § 856(a)(2) and one count of possessing ammunition while being an unlawful user of marijuana. Mark Maciolek was appointed to

represent him at government expense. On October 7, 2009, defendant appeared in court with his counsel to enter a plea of guilty. Defendant was sworn before being questioned about his understanding of the charges and the plea agreement.

Defendant entered a plea of guilty to count 5 of the indictment, the possession of ammunition charge. He agreed orally at the hearing and in the written plea agreement that when the court sentenced him, it could take into consideration the conduct underlying count 4, maintaining a drug house. Plea hrg. trans., dkt. #100, at 18. (Defendant's counsel had negotiated this arrangement with the government as a means of keeping defendant out of custody until his prison term began, so that he could help care for his ill wife; conviction of the drug house charge would have required the court to put defendant into custody pending sentencing.)

During the course of the plea hearing, defendant assured the court that he had had sufficient time to talk with his counsel about the charges against him and the effect of the sentencing guidelines on any sentence he would receive, that he understood the terms of the plea agreement and that he had committed the acts underlying count 5 (being a user of marijuana while he possessed ammunition).

Defendant's sentencing was continued several times because of problems with his health, but finally took place on March 16, 2010. At that time, he assured the court that he had read the presentence report and the addendum and that he had no objections to

anything in the report or the addendum. Sent. trans., dkt. #90, at 2-3. His counsel argued at length about the number of points that should be attributed to defendant for his maintenance of a drug house. At no time did defendant raise any objection to the court's taking that crime into consideration.

Defendant was sentenced to a term of 63 months. Because of his continuing health problems, it was some time before he was ordered to report for service of his sentence. He took an appeal of his sentence. When his appellate counsel moved to withdraw on the ground that any appeal was frivolous, the Court of Appeals for the Seventh Circuit allowed defendant to file a brief in opposition to the motion, but upheld counsel's motion to withdraw. The court determined that defendant had not shown that he was entitled to a four-level reduction under U.S.S.G. § 2D1.8(a)(2), which gives a discount to a defendant who maintained a drug house but who did not engage in broader criminal activity. This was the only issue of any significance. As the court of appeals noted, defendant did not indicate that he wanted to challenge his guilty plea so it refrained from assessing the voluntariness of the plea or the adequacy of the plea colloquy.

OPINION

The general rule is that a defendant who seeks post conviction relief cannot raise in a § 2255 motion any issue he raised on direct appeal that was decided against him or any

issue he could have raised on direct appeal but failed to do so. A major exception to this rule is an allegation of ineffectiveness of counsel, because such allegations often rest on facts that are not in the trial record and therefore are not available for review by the court of appeals. Defendant's contention that his guilty plea was neither knowing nor voluntary because of his counsel's failure to give him effective representation fits within the category of claims that need not be raised on direct appeal. This does not mean, however, that his claim is one that can succeed.

Defendant alleges that counsel deceived him into thinking that the government would be dismissing count 4 if he pleaded guilty to count 5, but this allegation is refuted by the transcript of the plea hearing, which shows that the government explained that the conduct charged in count 4 would be used to determine defendant's sentence and that defendant told the court that he understood this aspect of the agreement. Plea hrg. trans., dkt. #100, at 8-9; *id.* at 13. Defendant never told the court that he was not aware that this was part of the plea agreement, that his counsel had never told him about it or that he did not want to plead guilty if the count 4 conduct was to be taken into consideration.

A guilty plea proceeding is a serious event, designed to determine whether a defendant understands the charges against him, the potential penalties to which he is exposed and the nature of any plea agreements. The statements made in such a hearing are generally binding upon both the defendant and the government. United States v. Peterson, 414 F.3d 825, 827

(7th Cir. 2005) (“Judges need not let litigants contradict themselves so readily; a motion that can succeed only if the defendant committed perjury at the plea proceedings may be rejected out of hand unless the defendant has a compelling explanation for the contradiction.”) See also United States v. Cieslowski, 410 F.3d 353, 358 (7th Cir. 2005); United States v. Gwiadzinski, 141 F.3d 784, 788 (7th Cir. 1998); United States v. Martinez, 169 F.3d 1049, 1054 (7th Cir. 1999) (“the record of a Rule 11 proceeding is entitled to a “presumption of verity” . . . and the answers therein are binding”) (quoting United States v. Winston, 34 F.3d 574, 578 (7th Cir. 1994)).

If, as defendant says, his lawyer had told him that the government was dropping the charge in count 4 in return for his plea to count 5, one would expect that he would have expressed surprise when he heard the Assistant United States Attorney say that the conduct underlying count 4 *would* be taken into consideration in sentencing. Yet defendant remained silent. A few minutes later when he was asked whether he understood the terms of the plea agreement, he assured the court that he did. What’s more, he said that he had not been promised anything that was not in the plea agreement.

These assertions, given under oath in open court, refute the allegations in his post conviction motion. His motion will be dismissed as to this claim.

Defendant’s second claim is that the court was without jurisdiction to use the conduct in count 4 to increase his base offense level. As I understand it, defendant is arguing that

because he did not plead guilty to count 4, the court had no jurisdiction over that count. This claim is without merit. The court had jurisdiction over the entire charge against defendant, which included the drug house charge in count 4. Moreover, a sentencing court is not prohibited from considering information about “the background, character, and conduct of a person convicted of an offense” in considering an appropriate sentence for the person. 18 U.S.C. § 3661. Findings underlying sentencing enhancements may be based on uncharged conduct. United States v. Jones, 635 F.3d 909 (7th Cir. 2011) (citing Witte v. United States, 516 U.S. 389, 402-03 (1995)).

Finally, defendant contends that his lawyer never discussed the presentence report with him and for that reason, defendant was unable to challenge the information that he was involved in cooking and packaging. Had counsel done so, defendant argues, he would have received a four-level downward adjustment. Again, defendant told the court that he *had* read the report and addendum and that he had no further objections to anything in those documents. In any event, as the government points out, had defendant challenged the witness statements, he would have been risking the loss of a three-point adjustment for acceptance of responsibility and if he were found to have testified untruthfully, the addition of a two-point adjustment for obstruction of justice. He cannot show that his lawyer was ineffective in not encouraging him to pursue such a foolhardy venture.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue

or deny a certificate of appealability when entering a final order adverse to a defendant. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Defendant has not made a substantial showing of a denial of a constitutional right so no certificate will issue.

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Jermaine Grant's motion for post conviction relief

under 28 U.S.C. § 2255 is DENIED.

Entered this 18th day of May, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge